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March 28, 2003

RECEIVED

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED
MAR 28 2003
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex Parte*
CG Docket No. 02-278 and CC Docket No. 92-90
Rules and Regulations Implementing the Telephone Consumer Protection
Act of 1991

Dear Ms. Dortch:

On March 27, 2003, Alexander Netchvolodoff, Senior Vice President of Public Policy for Cox Enterprises, Inc. ("Cox"), David Mills and To-Quyen Truong, counsel for Cox, met with Bureau Chief Dane Snowden, Deputy Bureau Chief Margaret Egler, and Acting Division Chief Richard Smith of the Consumer and Governmental Affairs Bureau. **At** this meeting, **we** discussed the arguments set forth in Cox's Comments in the above-referenced proceeding, focusing on issues of potential common carrier liability. **A** copy of certain litigation pleadings provided at the meeting is attached hereto.

The participants also discussed a state court action that alleges common carrier liability under the Telephone Consumer Protection Act ("TCPA"). As requested by the staff, attached hereto is a copy of the state court's order and minutes, which stay the case until July 8, 2003, and require an updated case management (status) report on the FCC proceeding and pending federal case.

As discussed in Cox's Comments and at the meeting, common carriers whose customers might engage in fax advertising cannot and must not be subject to TCPA liability unless (a) they step out of their traditional role of providing telecommunications services and engage in control over the content or destination of prohibited facsimile advertisements (e.g., by developing fax lists or preparing ad content), or (b) they are given official notice (from the Commission or a court) that their facilities are being used illegally under the TCPA, have reason to believe such conduct will continue, and fail to take appropriate action. Otherwise, application of a lower standard would force common carriers into the role of "electronic censors" with enormous, and obvious, negative implications for consumers and telephone competition. For example, a common carrier receiving a complaint about any individual or small business (not just about a fax broadcaster) sending an unsolicited fax ad could be obligated to investigate, make factual and legal determinations, and, perhaps, terminate service for the individual or business merely to

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List ABOVE

avoid exposure to TCPA liability. This is not the design of the TCPA and would undermine the fundamental and critical role of common carriers in the United States.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and enclosure are being submitted to the Secretary's office for the above-captioned docket, and a copy is being provided to the meeting attendees. Pursuant to the Commission's *Notice of Proposed Rulemaking* in this proceeding, four copies also are being provided to Kelli Farmer. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David E. Mills", with a stylized, flowing script.

David E. Mills

cc: Dane Snowden
Margaret Egler
Richard Smith
Kelli Farmer (4 copies)

ORIGINAL

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SEP 22 11:00 AM
RICHARD W. HENNING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REDEFINING PROGRESS, a California
Non-Profit Corporation; on behalf of itself
and all others similarly situated, and on
behalf of the general public.

Case No.

C 02

4057

CLASS ACTION COMPLAINT

Plaintiff.

DEMAND FOR JURY TRIAL

FAX.COM, INC.; KEVIN KATZ; CON
BUSINESS SERVICES, L.L.C.;
AMERICAN BENEFIT MORTGAGE,
INC., and all others similarly situated; and
DOES 1 through 10,000,

Defendants

Plaintiff, REDEFINING PROGRESS (hereafter "Plaintiff"), on behalf of itself and
all others similarly situated, and on behalf of the general public, alleges on information and belief,
except as to those actions concerning Plaintiff, as follows:

INTRODUCTION

1. Under the Telephone Consumer Protection Act of 1991 (hereafter
"TCPA"), 47 U.S.C. § 227, and its implementing regulations, 47 C.F.R. § 64.1200(a)(3), it is
unlawful for any person "to use any telephone facsimile machine, computer, or other device to
send an unsolicited advertisement to a telephone facsimile machine". 47 U.S.C. § 227(b)(1)(C).

1 Defendants, FAX.COM, INC., KEVIN KATZ, COX BUSINESS SERVICES, L.L.C.,
2 AMERICAN BENEFIT MORTGAGE, INC., and DOES 1 through 10,000 (hereafter collectively
3 referred to as "Defendants"), have willfully and knowingly violated the TCPA by "fax
4 broadcasting" millions of unsolicited advertisements nationwide. The term "fax broadcasting"
5 means the practice of faxing text or images *en masse* to several recipients at once, where each fax
6 number dialed is drawn from a list or database of fax numbers. Defendant Cox Business
7 Services, L.L.C., has further continued to cause or permit Defendants' practice of unlawful fax
8 broadcasting in violation of the Communications Act of 1934 (hereafter "Communications Act"),
9 47 U.S.C. §§ 206 and 207. Plaintiff has received numerous unsolicited fax advertisements from
10 Defendants. Pursuant to the TCPA, Communications Act, and California's Unfair Competition
11 Law, Business & Professions Code §§ 17200 et seq., Plaintiff brings this class action to seek
12 relief from Defendants' unlawful and unfair business practices and acts.

13 JURISDICTION AND VENUE

14 2. This Court has original jurisdiction pursuant to the Communications Act,
15 47 U.S.C. §§ 206 and 207, and supplemental jurisdiction over Plaintiff's remaining claims under
16 28 U.S.C. § 1367.

17 3. This Court has personal jurisdiction over Fax.com, Inc. because it has its
18 principal place of business in Aliso Viejo, California, does extensive business in California, has
19 sufficient minimum contacts with California, and otherwise intentionally avails itself of the
20 markets in California through the promotion, marketing, sale, and distribution of services in
21 California to render the exercise of jurisdiction by the California courts permissible under
22 traditional notions of fair play and substantial justice.

23 4. This Court has personal jurisdiction over Kevin Katz because he is a
24 California resident and the President of Fax.com.

25 5. This Court has personal jurisdiction over Cox Business Services, L.L.C.
26 because it does extensive business in California, has sufficient minimum contacts with California,
27 and otherwise intentionally avails itself of the markets in California through the promotion,
28 marketing, sale, and distribution of products and services in California to render the exercise of

jurisdiction by the California courts permissible under traditional notions of fair play and substantial justice.

6. This Court has personal jurisdiction over American Benefit Mortgage, Inc. because it is a California corporation which has its principal place of business in Aliso Viejo, California, does extensive business in California, has sufficient minimum contacts with California, and otherwise intentionally avails itself of the markets in California through the promotion, marketing, sale, and distribution of products and services in California to render the exercise of jurisdiction by the California courts permissible under traditional notions of fair play and substantial justice.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c). Defendants sent unsolicited fax advertisements to numerous persons residing in Alameda County, including Plaintiff. Many of the acts giving rise to the violations complained of herein occurred and had their primary effect in this county.

8. Intradistrict Assignment. Pursuant to Civil L.R. 3-2(c) and 3-5(b), the assignment of this case to the San Francisco Division or Oakland Division is proper because a substantial part of the events or omissions which give rise to Plaintiff's claims occurred in Alameda County.

PARTIES

9. Plaintiff Redefining Progress is a non-profit organization located in Oakland, California. Plaintiff Redefining Progress received unsolicited fax advertisements from Defendants on numerous occasions.

10. Defendant Fax.com, Inc. (hereinafter "Fax.com") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Aliso Viejo, California. Fax.com operates its business through its website at www.fax.com and is the largest fax broadcaster in the United States, boasting the world's largest database of fax numbers.

11. Defendant Kevin Katz is, and at all times relevant was, a citizen of California residing in southern California. Kevin Katz is the co-founder, co-owner, and President

1 of Fax.com.

2 12. Defendant Cox Business Services, L.L.C. (hereinafter "**Cox Business**
3 Services") is a limited liability company organized and existing under the laws of the State of
4 Delaware with its principal place of business in Atlanta, Georgia. On its website,
5 www.coxbusiness.com, Cox Business Services describes itself as "the commercial broadband
6 division of Cox Communications," Inc., a publicly traded company with annual revenues totaling
7 nearly \$5 billion.

8 13. Defendant American Benefit Mortgage, Inc. is a corporation organized and
9 existing under the laws of the State of California with its principal place of business in Aliso
10 Viejo, California. American Benefit Mortgage, Inc. operates its business through its websites
11 www.absloans.com and www.americanbenefit.net and provides loans and refinancing services.

12 14. Does 1 through 10,000 are persons or entities that employed or used
13 Fax.com's fax broadcasting service and fax number database to fax unsolicited advertisements via
14 telephone facsimile machine, computer, or other device to a telephone facsimile machine located
15 in the United States. Plaintiff sues Does 1 through 10,000, as the actual names or capacities of
16 the individuals or entities of Does 1 through 10,000 are presently unknown to plaintiff's counsel
17 at this time. On information and belief, each of the unnamed Doe defendants is legally
18 responsible for some or all of the acts or omissions alleged in this Complaint or acted as an agent,
19 servant, employee and/or joint venturer of one or more of the named defendants. Plaintiff will
20 amend this Complaint when the identity of any of the Doe defendants is ascertained.

21 FACTUAL ALLEGATIONS

22 15. Fax.com is a privately held company founded in 1998 by Kevin Katz and
23 Eric Wilson. Fax.com was incorporated for the principal purpose of engaging in the business of
24 sending unsolicited advertisements to telephone facsimile machines, which is illegal under federal
25 law. Kevin Katz is the President of Fax.com.

26 16. At all times relevant herein, Kevin Katz has directed, controlled, managed,
27 and determined the actions, day-to-day business, and direction of Fax.com. Kevin Katz so
28 dominates and controls the affairs of Fax.com that it is his alter ego, and Fax.com's actions and

1 course of conduct may be fairly attributed to him.

2 17. Fax.com's mission has been "to revolutionize the fax broadcasting industry
3 by building the world's largest geographic fax number database." To this end, "Fax.com
4 purchases fax numbers and other data from hundreds of sources all over the world", and has
5 developed its own exclusive fax number database by using computers and automated dialing
6 equipment to constantly search for and collect "undiscovered" fax numbers.

7 18. Fax.com has also partnered with ThinkTank Holdings LLC and Cox
8 Business Services to help expand its fax broadcasting business. Cox Business Services provides
9 Fax.com with a "fiber optic-based broadband network" that "delivers a range of advanced
10 communications services, including high-speed Internet access, local and long distance telephone,
11 and advanced voice and data transport solutions for companies of all sizes."

12 19. Today, Fax.com is the owner of the "world's largest database of fax
13 numbers": a database that "exceed[s] 30 million fax numbers" from across the United States
14 cataloged by location. Using Fax.com's database, customers of Fax.com may broadcast their
15 advertisement by "Radius, Zip Code, Metro Area, Area Code, County, State or the entire U.S."
16 Fax.com's fax numbers are advertised to be the most complete set of current and new fax
17 numbers.

18 20. Since 2001, Fax.com has broadcasted over three million faxes per day to
19 unsuspecting recipients.

20 21. In addition to providing their fax broadcasting services to "local dentists,
21 chiropractors, restaurants . . . and many more", Fax.com works "with some of the biggest
22 companies in the U.S." including "Merrill Lynch, Flagstar Bank, Mail Boxes Etc., Carl's Jr.,
23 Super 8 Motel, Buy.com and the Broadcasting Marketing Group".

24 22. Fax.com offers their fax broadcasting service as a means for clients to
25 achieve their direct marketing goals. Using Fax.com's extensive fax number database and fax
26 broadcasting services, clients can deliver a marketing piece "to anyone, anywhere, anytime" to
27 reach "hundreds, thousands, or even millions" of potential consumers.

28 23. Fax.com actively assists its fax broadcasting clients "to develop and plan a

complete fax campaign, integrating [the client's] faxes with [their] other marketing tactics, including direct mailers, the Web advertising and broadcast e-mail." Fax.com assists in creating a regular schedule of fax broadcasting, targeting select groups of potential customers with custom designed fax ads. Fax.com also provides each client with an account manager to assist the client through its online network.

24. Fax.com also actively helps its fax broadcasting clients to design ads for their business.

"We have a professional design team on staff. If you would like, we can send you a questionnaire about your company, consult with you and design outstanding custom fax broadcast ads ~~for~~ you."

"All you need to do is send us your ad or have our design department create a custom ad, choose your data, and watch new customers start coming to you."

"Our design department will work with you to design your fax ad, choose type fonts, create graphics, and develop the ideal fax that will achieve the greatest response."

25. With Fax.com's fax broadcasting service, immediate reporting on fax broadcasting campaign successes and costs are provided. Busy or non-answering fax numbers are automatically redialed.

26. A removal number is also printed on the bottom of each faxed advertisement to allow the recipient to remove their fax number from Fax.com's database. Fax.com uses such removal numbers as: (800) 443-7620 (now disconnected), (800) 443-7628, (800) 457-5410, (800) 663-8758, (800) 766-0816, (800) 785-6698, (800) 822-9033, (800) 965-7235, and (800) 992-5329.

27. Fax.com's fax broadcasting service is marketed as a faster, cheaper, and more effective alternative to direct mail; a cost-effective means for smaller businesses to compete with major corporations for potential consumers; and as being perfect for home businesses, direct sellers, companies who mass market products to consumers, advertising agencies and marketing firms. As advertised on Fax.com's website:

"Fax broadcasting is by far the least expensive form of brand and awareness development. Each fax costs less than a bulk mail stamp, and NO fax ever goes unread."

1 "Home office businesses are the wave of the future, and I-fax.com is offering faxing
2 services with an ease and low cost you won't find from any other company. Use it
regularly to build your business and increase your income!"

3 "Fax broadcasting is so effective and so inexpensive, it allows anyone to market
4 like the big boys."

5 28. Since 1999, the Federal Communications Commission (hereafter "FCC")
6 has determined that unsolicited fax advertisements were a significant problem for consumers, and
7 the FCC has issued numerous citations to fax broadcasters, such as Fax.com and their clients.

8 29. To date, Fax.com has received the greatest number of citations from the
9 FCC for its repeated violations of the TCPA, 47 U.S.C. § 227.

10 30. On December 26, 2000, the FCC issued four separate citations to Fax.com
11 for fax broadcasting unsolicited advertisements on behalf of Platinum Travel and/or Teleconcepts
12 Technologies, Inc. (File No. EB-00-TC-148); www.TelProducts.com a.k.a. Millennium
13 (TelProducts-Dom), Millennium Marketing & Sales a.k.a. Millennium Contact (File No. EB-00-
14 TC-149); Website University.com-Internship Program, Customer Focus Technologies and/or NCJ
15 Investment (File No. EB-00-TC-150); and Colorjet, Inc. (File No. EB-00-TC-179).

16 31. On May 11, 2001, the FCC issued a citation against Fax.com for fax
17 broadcasting unsolicited advertisements on behalf of US Travel Services, Inc., a.k.a. Discovery
18 Marketing, Inc., a.k.a. Omega Marketing of Orlando, Inc., a.k.a. Consumer Magic (File No. EB-
19 01-TC-027).

20 32. On May 31, 2001, the FCC issued a citation against Fax.com for fax
21 broadcasting unsolicited advertisements on behalf of Advanced Cellular Communications, Inc.
22 (File No. EB-01-TC-028).

23 33. Most recently, on August 7, 2002, the FCC proposed a \$5,379,000 fine
24 against Fax.com for fax broadcasting unsolicited advertisements. This fine would be the largest
25 ever proposed by the FCC for violations of the TCPA. The proposed fine was based on
26 Fax.com's apparent violation of the TCPA and the FCC's rules on 489 separate occasions.

27 "It is clear from Fax.com's own promotional materials and its responses to our
28 citations that Fax.com's primary business activity itself constitutes a massive on-
going violation of section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of the

Commission's rules, and that Fax.com is well aware of this fact. Fax.com's primary commercial offering is a fax broadcasting service that clearly does not comply with federal restrictions governing facsimile advertisements."

(File No EB-02-TC-120) .

34. Under a Consent Decree with the State of Washington, Fax.com through Kevin Katz, agreed to stop fax broadcasting advertisements into the State of Washington unless the recipient expressly authorized the receipt of the fax transmission, or had a *bona fide* preexisting contractual or business relationship with the initiator of the fax

35. At all times, Cos Business Services had a high degree of involvement or actual notice of Fax.com's fax broadcasting and marketing tactics. In a "Press Room" "Case Study", Cox Business Services announced that "Fax.com Partners With Cos Business Services for a Reliable, Cost-Effective Telephone Solution". The case study states:

"With one of the largest fax databases in the world, Internet fax marketing company Fax.com has built its business around the technology that supports it. Since reliable telephone communications are vital to the success or failure of his company, Fax.com President Kevin Katz can't afford to take the issue of reliability too lightly "

"We're using Cox Communications' network and infrastructure for the core component of our business - marketing to companies through fax broadcast documents," said Katz. "Since we make our money through fax broadcasting, we need a reliable telephone service provider like Cox. Without telephone service, we're essentially shut down "

36. Cox Business Services provides Fax.com with "a pair of T1 lines . . . for its in-house telephone system that includes 40 private lines for employees. Cox [Business Services] completes Fax.com's suite of broadband services by also providing Internet access, data transfer and video services. "Very few companies can match Cox's ability to offer all of the broadband services," commented Katz." Cox Business Services owns and maintains the network.

37. Cox Business Services' telephone product is delivered to Fax.com "through one of the highest-capacity, most reliable broadband delivery networks in the world." Cox Business Services' "self-healing, ring-in-ring SONET technology provides an uninterrupted connection through a 99.99 percent reliable hybrid fiber coaxial (HFC) cable network that surpasses Bellcore standards." Cox Business Services also provides to Fax.com "the end-to-end management of its network infrastructure, everything from the office building to its Master

1 Telecommunications Center in Aliso Viejo.”

2 38. Cox Business Services provides all of Fax.com’s business needs. “‘With
3 Cox., I can easily get everything I need to run my business from one carrier,’ said Katz. ‘They’ve
4 even been able to customize services to suit my business needs.’” “For as much as Katz says the
5 Fax.com phone system relies entirely on Cox, he’s also come to depend on the personalized
6 customer service. ‘It’s beneficial for my business because they’re local and I think they’re a little
7 easier to deal with than some of the other phone companies,’ he said. ‘They give us better
8 support and are more apt to understand what a small business is looking for. Plus, they
9 understand the small business mentality a little better.’”

10 39. Despite Cox Business Services’ high degree of involvement in and actual
11 notice of Fax.com’s fax illegal fax broadcasting, Cox Business Services has failed to take steps to
12 prevent such transmissions.

13 40. Since approximately August 2000, Plaintiff Redefining Progress has
14 received approximately five unsolicited fax advertisements from businesses using Fax.com’s fax
15 broadcasting service, including faxes from Defendants Commercial Mortgage Corporation and
16 American Benefit Mortgage, Inc..

17 41. Each unsolicited fax sent by Fax.com to Plaintiff Redefining Progress
18 advertised the commercial availability or quality of property, goods, or services including
19 financial lending services, cellular phone service and vacation packages.

20 42. At no time has Plaintiff expressly invited or permitted Defendants to fax
21 advertisements to his telephone facsimile machine. No pre-existing business or contractual
22 relationship with Defendants existed at the time Plaintiff received Defendants’ unsolicited fax
23 advertisements.

24 43. Defendant American Benefit Mortgage, Inc. used Fax.com’s fax
25 broadcasting service to fax over 10,000 unsolicited advertisements to persons nationwide.

26 44. Each unsolicited fax advertised the commercial availability or quality of
27 property, goods, or services being offered by Defendant American Benefit Mortgage, Inc..

28 45. Prior to the fax broadcasting of each advertisement, Defendant American

1 Benefit Mortgage, Inc. failed to obtain the express permission or invitation of Plaintiff Redefining
2 Progress to fax advertisements to its telephone facsimile machine.

3 46. By this action, Plaintiff seeks statutory and treble damages, and a
4 permanent injunction enjoining Defendants from continuing their unlawful practice of fax-
5 broadcasting unsolicited advertisements.

6 47. This Complaint states causes of action for (a) violations of the Telephone
7 Consumer Protection Act, 47 U.S.C. § 227, for Defendants' practice of fax broadcasting
8 unsolicited faxes; (b) violations of the Communications Act, 47 U.S.C. §§ 206 and 207, for
9 Defendant Cox Business Services' causing or permitting Defendants' practice of unlawful fax
10 broadcasting of unsolicited faxes; and (c) violations of California Business and Professions Code
11 §§ 17200 et seq., for Defendants' unlawful and unfair business acts and practices.

12 **PLAINTIFF CLASS ACTION ALLEGATIONS**

13 48. Plaintiff brings this class action on behalf of himself and all other persons
14 similarly situated, pursuant to Federal Rules of Civil Procedure 23(a), (b)(2) and (b)(3).

15 49. The class which Plaintiff seeks to represent is defined as:
16 All persons or entities within the United States, excluding the State of Washington,
17 who received through their telephone facsimile machine, an unsolicited
18 advertisement, transmitted by Fax.com on or after August 22, 1998 (the "Plaintiff
19 Class").

20 50. Excluded from the Plaintiff Class are Defendants, their employees, any
21 judge or justice assigned to hear any aspect of this litigation, any spouse or relative of such judge
22 or justice within the third degree of relationship, or the spouse of any such person.

23 51. Numerosity (Fed. R. Civ. P. 23(a)(1)). The Plaintiff Class is composed of
24 millions of persons, businesses, and other entities, and joinder of them all in one action would be
25 impractical. The disposition of their claims through this class action will benefit both the parties
26 and this Court. The identities of individual members of the Plaintiff Class are ascertainable
27 through Defendants' fax transmittal records and fax number database.

28 52. Typicality (Fed. R. Civ. P. 23(a)(3)): Plaintiff's claims are typical of the

1 claims of the entire Plaintiff Class, in that Plaintiff and absent Plaintiff Class members each
2 received one or more unsolicited advertisements from defendant Fax.com through their telephone
3 facsimile machines.

4 53. Common Questions of Fact and Law (Fed. R. Civ. P. 23(a)(2) and (b)(3)):

5 The questions of fact and law common to the Plaintiff Class predominate over questions which
6 may affect individual members, and include the following:

- 7 (a) Whether Defendants used a telephone facsimile machine, computer or other device
8 to send an unsolicited advertisement to a telephone facsimile machine;
- 9 (b) Whether Defendants' use of a telephone facsimile machine, computer or other
10 device to send an unsolicited advertisement to a telephone facsimile machine
11 violated the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C);
- 12 (c) Whether Defendants Fax.com, Kevin Katz, and Cox Business Services' fax
13 broadcasting of unsolicited fax advertisements was willful or knowing;
- 14 (d) Whether Plaintiff and the Plaintiff Class are entitled to statutory and or treble
15 damages as provided by 47 U.S.C. § 227(b)(3) for Defendants' acts and conduct;
- 16 (e) Whether Defendants engaged in unlawful acts within the meaning of the
17 Communications Act, 47 U.S.C. § 206;
- 18 (f) Whether Defendant Cox Business Services caused or permitted Defendants'
19 unlawful practice of fax broadcasting of unsolicited advertisements;
- 20 (g) Whether Defendant Cox Business Services' acts or conduct violated the
21 Communications Act, 47 U.S.C. § 206;
- 22 (h) Whether Plaintiff and the Plaintiff Class are entitled to damages as provided by 47
23 U.S.C. § 207 for Defendant Cox Business Services' acts and conduct;
- 24 (i) Whether Defendants engaged in unlawful or unfair business practices and acts
25 within the meaning of California Business & Professions Code §§ 17200 et seq.;
26 and
- 27 (j) Whether Plaintiff and the members of the Plaintiff Class are entitled to a
28 permanent injunction enjoining Defendants from continuing to engage in unlawful

1 or unfair business practices and acts.

2 54. Adequacy of Representation (Fed. R. Civ. P. 23(a)(4)): Plaintiff is an
3 adequate representative of the Plaintiff Class because his interests do not conflict with the
4 interests of the Plaintiff Class members Plaintiff seeks to represent. Plaintiff will fairly,
5 adequately, and vigorously represent and protect the interests of the Plaintiff Class and has no
6 interests antagonistic to the Plaintiff Class. Plaintiff has retained counsel who are competent and
7 experienced in the prosecution of class action litigation.

8 55. Superiority (Fed. R. Civ. P. 23(b)(3)): A class action is superior to other
9 available means for the fair and efficient adjudication of the claims of the Plaintiff Class. While
10 the aggregate damages awarded to the Plaintiff Class are likely to be billions of dollars, the actual
11 damages suffered by individual members of the Class is relatively small. As a result, the expense
12 and burden of individual litigation makes it economically infeasible and procedurally
13 impracticable for each member of the Plaintiff Class to individually seek redress for the wrongs
14 done to them. The likelihood of individual Class members prosecuting separate claims is remote.
15 Individualized litigation would also present the potential for varying, inconsistent or contradictory
16 judgments, and would increase the delay and expense to all parties and the court system resulting
17 from multiple trials of the same factual issues. Plaintiff knows of no difficulty to be encountered
18 in the management of this action that would preclude its maintenance as a class action.

19 56. Injunctive Relief (Fed. R. Civ. P. 23(b)(2)): Defendants have acted on
20 grounds generally applicable to the class, thereby making appropriate final injunctive relief with
21 respect to the class as a whole.

22 DEFENDANT CLASS ALLEGATIONS

23 57. Plaintiff brings this class action against Defendant American Benefit
24 Mortgage, Inc. and the Defendant Class defined in the following paragraph, pursuant to the
25 Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3).

26 58. The class Plaintiff seeks to proceed against is defined as:

27 All persons or entities that employed or used Fax.com's fax broadcasting service
28 and fax number database to fax unsolicited advertisements via telephone facsimile

1 machine, computer, or other device to a telephone facsimile machine located in the
2 United States, except for the State of Washington, on or after August 22, 1998 (the
3 "Defendant Class").

4 59. Excluded from the Defendant Class are any judge or justice assigned to
5 hear any aspect of this litigation, any spouse or relative of such judge or justice within the third
6 degree of relationship, or the spouse of any such person.

7 60. Numerosity (Fed. R. Civ. P. 23(a)(1)): The Defendant Class is composed
8 of thousands of businesses and joinder of them all in one action would be impractical. The
9 disposition of the claims against Defendant Class members will benefit both the parties and this
10 Court. The identities of individual members of the Defendant Class are ascertainable through
11 Defendants' fax transmittal and business records.

12 61. Typicality (Fed. R. Civ. P. 23(a)(3)): Defendant American Benefit
13 Mortgage, Inc. will likely assert defenses that are typical of all members of the Defendant Class,
14 and the Defendant Class' common course of conduct caused injury to Plaintiff and the Plaintiff
15 Class. Each Defendant Class member is alleged to have used Fax.com's fax broadcasting service
16 and telephone facsimile machines, computers or other devices to fax unsolicited advertisements to
17 Plaintiff and members of the Plaintiff Class.

18 62. Common Questions of Fact and Law (Fed. R. Civ. P. 23(a)(2) and (b)(3)):
19 The questions of fact and law common to the Defendant Class predominate over questions which
20 may affect individual members, and include the following:

- 21 (a) Whether Defendant Class members used or employed Fax.com's fax broadcasting
22 services;
- 23 (b) Whether Defendant Class members used a telephone facsimile machine, computer
24 or other device to send an unsolicited advertisement to a telephone facsimile
25 machine;
- 26 (c) Whether Defendant Class members' use of a telephone facsimile machine,
27 computer or other device to send an unsolicited advertisement to a telephone
28 facsimile machine violated the Telephone Consumer Protection Act, 47 U.S.C. §

227;

- (d) Whether members of the Defendant Class obtained the express permission or invitation from Plaintiff and members of the Plaintiff Class to fax advertisements to their telephone facsimile machine;
- (e) Whether Defendant Class members are liable to Plaintiff and members of the Plaintiff Class for statutory damages as provided by 47 U.S.C. § 227(b)(3);
- (f) Whether Defendant Class members engaged in unlawful or unfair business practices and acts within the meaning of California Business & Professions Code §§ 17200 et seq.; and
- (g) Whether Plaintiff and members of the Plaintiff Class are entitled to a permanent injunction enjoining Defendants and members of the Defendant Class from continuing to engage in unlawful or unfair business practices and acts.

63. Adequacy of Representation (Fed. R. Civ. P. 23(a)(4)): Defendant American Benefit Mortgage, Inc. is an adequate representative of Defendant Class because its interests do not conflict with the interests of the Defendant Class. Defendant American Benefit Mortgage, Inc. will fairly, adequately, and vigorously represent and protect the interests of the Defendant Class.

64. Superiority (Fed. R. Civ. P. 23(b)(3)): A class action is superior to other available means for the fair and efficient adjudication of the claims against Defendant American Benefit Mortgage, Inc. and members of the Defendant Class. Individualized litigation would present the potential for varying, inconsistent or contradictory judgments, and would increase the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a bilateral class action. Injunctive relief with respect to Defendant American Benefit Mortgage, Inc. and members of the Defendant Class would be proper.

65. Injunctive Relief (Fed. R. Civ. P. 23(b)(2)): The Defendant Class has acted on grounds generally applicable to the Plaintiff Class, thereby making appropriate final injunctive

relief with respect to the Defendant Class.

FIRST CAUSE OF ACTION
For Violation of 47 U.S.C. § 227
(On Behalf of Plaintiff and the Plaintiff Class)

66. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this Complaint,

67. Plaintiff asserts this claim on behalf of himself and the Plaintiff Class against Defendants and the Defendant Class.

68. The faxes sent to Plaintiff and the Plaintiff Class by Defendants and the Defendant Class constitute "unsolicited advertisements" as defined by the Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(4): "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

69. Plaintiff and the Plaintiff Class did not provide Defendants or the Defendant Class with any prior express invitation or permission to send the fax advertisements.

70. Through their conduct, Defendants and the Defendant Class violated the Telephone Consumer Protection Act, which prohibits the sending of unsolicited fax advertisements.

71. Defendants Fax.com, Kevin Katz, and Cox Business Services were aware of the provisions of the TCPA, and their violations of the TCPA were both willful and knowing.

72. Accordingly, Defendants and the Defendant Class are liable to Plaintiff and the Plaintiff Class in the statutory damage amount of \$500 per unsolicited fax advertisement sent, and Defendants Fax.com, Kevin Katz, and Cox Business Services are liable to Plaintiff and the Plaintiff Class for treble damages of \$1500 per unsolicited fax advertisement sent. Defendant Fax.com boasts of sending approximately 3 million such unsolicited faxes per day. Accordingly, before trebling, such damages equal approximately \$1.5 billion per day, \$45 billion per month, and \$547 billion per year.

73. Defendants and the Defendant Class caused Plaintiff and the Plaintiff Class to sustain damages, in addition to statutory damages, equal to the cost of thermal facsimile paper.

1 or paper and inkjet cartridge use or laser printer toner. Plaintiff presently estimates the cost of
2 these supplies at \$0.10 for each one page, unsolicited fax advertisement received. Defendant
3 Fax.com boasts of sending approxiniately 3 million such unsolicited faxes per day. Accordingly,
4 such damages equal approximately 9300.000 per'day, \$9 million per month, and \$109 million per
5 year

6 74. The TCPA was enacted to protect the right of privacy of Plaintiff and the
7 Plaintiff Class. The conduct alleged herein constitutes a highly offensive intrusion into the homes
8 and businesses of Plaintiff and the Plaintiff Class, and violates the right of privacy of Plaintiff and
9 the Plaintiff Class. The damages sought herein arise from these violations, and constitute
10 "Advertising Injury" within the meaning of standard-form Commercial General Liability or
11 Comprehensive General Liability insurance policies maintained by most businesses, including
12 members of the Defendant Class

13 **SECOND CAUSE OF ACTION**

14 **Against Cox Business Services For Violation of 47 C.S.C. §§ 206 and 207**
15 **(On Behalf of Plaintiff and the Plaintiff Class)**

16 75. Plaintiff hereby incorporates by reference the allegations contained in all
17 preceding paragraphs of this Complaint.

18 76. Plaintiff asserts this claim on behalf of himself and the Plaintiff Class
19 against Defendant Cox Business Services.

20 77. Through their conduct, Defendants and the Defendant Class violated the
21 Telephone Consumer Protection Act, 47 U.S.C. § 227, which prohibits the sending of unsolicited
22 fax advertisements.

23 78. Defendant Cox Business Services caused or permitted the violation of the
24 TCPA by Defendants and the Defendant Class, by providing and servicing the telephone
25 communications system used by Fax.com to fax broadcast Defendants' unsolicited
26 advertisements. At all times, Cox Business Services possessed a high degree of involvement in
27 and had actual notice of Fax.com's illegal fax broadcasting.

28 79. Cox Business Services is liable to Plaintiff and the Plaintiff Class "for the

1 full amount of damages sustained in consequence of any such violation of the provisions of this
2 chapter” 47 U.S.C. § 207. Pursuant to the Communications Act, 47 U.S.C. § 206 and 207,
3 Defendant Cox Business Services is liable to Plaintiff and the Plaintiff Class in the statutory
4 damage amount provided for violations of the TCPA, 47 U.S.C. § 227: \$500 per unsolicited fax
5 advertisement sent.

6 **THIRD CAUSE OF ACTION**

7 **For Violation of California Business & Professions Code §§ 17200, et seq.
8 (On Behalf of Plaintiff, the Plaintiff Class and the General Public)**

9 80. Plaintiff hereby incorporates by reference the allegations contained in all
10 preceding paragraphs of this Complaint.

11 81. Plaintiff asserts this claim on behalf of himself and the Plaintiff Class, and
12 on behalf of the general public, against Defendants and the Defendant Class.

13 82. Defendants’ and the Defendant Class’ fax broadcasting of unsolicited
14 advertisements without the prior express invitation or permission of Plaintiff and the Plaintiff
15 Class constitutes an unlawful business practice or act in violation of the Telephone Consumer
16 Protection Act, 47 U.S.C. § 227.

17 83. Defendants’ and the Defendant Class’ fax broadcasting of unsolicited
18 advertisements without the prior express invitation or permission of Plaintiff and the Plaintiff
19 Class constitutes an unfair business practice or act. There is no substantial business justification
20 for these unlawful activities, which constitute an unwarranted annoyance and intrusion into the
21 homes and businesses of Plaintiff and the Plaintiff Class, and which cost Plaintiff and the Plaintiff
22 Class money in the form of waste of paper, facsimile paper, laser printer toner, and inkjet printer
23 cartridges, and by tying up telephone facsimile machines which Plaintiff and the Plaintiff Class
24 purchased and use for business or personal purposes.

25 84. Pursuant to California Business and Professions Code § 17203, Plaintiff
26 and the Plaintiff Class seek a permanent injunction compelling Defendants and the Defendant
27 Class to cease their unlawful and unfair business practices and acts.

28 **FOURTH CAUSE OF ACTION**

**Against Fax.com, Kevin Katz, and Cox Business Services For Unjust Enrichment
(On Behalf of Plaintiff and the Plaintiff Class)**

85. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this Complaint.

86. Plaintiff asserts this claim on behalf of himself and the Plaintiff Class, against Defendants Fax.com, Kevin Katz, and Cox Business Services.

87. As a result of their unlawful acts in violation of the TCPA, Defendants Fax.com and Kevin Katz have been unjustly enriched, in the form of revenues and profits retained by Fax.com, and compensation, profits, dividends, and other monies paid by Fax.com or its customers to Kevin Katz.

88. As a result of its unlawful acts in violation of the TCPA, Defendant Cox Business Services has been unjustly enriched, in the form of revenues received from defendant Fax.com, and profits deriving from those revenues.

89. Accordingly, Plaintiff and the Plaintiff Class seek the imposition of a constructive trust on the aforementioned sums, to be used to benefit Plaintiff and the Plaintiff Class by funding anti-spam educational, technological, and or litigation efforts.

FIFTH CAUSE OF ACTION

**Against Fax.com and Kevin Katz For Violation of
Uniform Fraudulent Transfer Act, Civil Code § 3439, et seq.
(On Behalf of Plaintiff and the Plaintiff Class)**

90. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this Complaint.

91. Plaintiff asserts this claim on behalf of himself and the Plaintiff Class, against Defendants Fax.com and Kevin Katz.

92. Fax.com was incorporated by Kevin Katz for the principal purpose of engaging in the business of sending unsolicited advertisements to telephone facsimile machines, in violation of federal law.

93. As a result of their unlawful activities, Fax.com and Kevin Katz have been subject to numerous individual lawsuits and class action lawsuits seeking statutory damages under the TCPA. Plaintiff and the Plaintiff Class, together with the named plaintiffs and absent class members in these other actions, constitute "creditors" within the meaning of California Civil

1 Code section 3439.01(c).

2 94. Kevin Katz is aware that a staggering judgment could be rendered against
3 Fax.com and Kevin Katz in many of these actions, which would bankrupt both Fax.com and
4 Kevin Katz. Accordingly, on information and belief, Kevin Katz has taken steps to transfer both
5 his own personal assets and assets of Fax.com to offshore accounts, with the actual intent to
6 hinder or delay the satisfaction of any such judgment, in violation of California Civil Code
7 section 3439.04(a).

8 95. On information and belief, Kevin Katz has directed customers of Fax.com
9 to make payment for Fax.com's services into Kevin Katz's personal offshore accounts, in
10 violation of California Civil Code section 3439.04(a).

11 96. Pursuant to California Civil Code section 3439.07, Plaintiff seeks: (a) an
12 order requiring the return of the transferred assets to financial institutions located within the
13 United States, and the identification of such institutions and accounts; (b) an injunction against
14 the further transfer of assets by Fax.com or Kevin Katz outside the United States; and (c)
15 appointment of a receiver to take charge of the affairs of Fax.com.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff prays for:

18 1. An order certifying the Plaintiff Class, appointing Plaintiff as the
19 representative of the Plaintiff Class, and appointing the law firm representing Plaintiff as counsel
20 for the Plaintiff Class;

21 2. An order certifying the Defendant Class, appointing American Benefit
22 Mortgage, Inc. as the representative of the Defendant Class;

23 3. An award to Plaintiff and the Plaintiff Class of statutory damages in the
24 amount of \$500 for each violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227,
25 by Defendants and the Defendant Class pursuant to 47 U.S.C. §§ 207 and 227;

26 4. An award to Plaintiff and the Plaintiff Class of statutory treble damages of
27 \$1500 for each unsolicited fax advertisement willfully or knowingly sent to Plaintiff and the
28 Plaintiff Class by Defendants Fax.com, Kevin Katz, and Cox Business Services;

1 5. **A permanent injunction enjoining Defendants and the Defendant Class**
2 from engaging in the unlawful and unfair acts and practices described above;

3 6. An order imposing a constructive trust upon all monies and assets
4 Defendants Fax.com and Kevin Katz have acquired from the Defendant Class as a result of their
5 unlawful and unfair acts and practices;

6 7. **An order imposing a constructive trust upon all monies and assets**
7 Defendant Cox Business Services has acquired from Defendant Fax.com as a result of their
8 unlawful and unfair acts and practices,

9 8. **An order requiring the return of fraudulently transferred assets and financial**
10 institutions located within the United States, and the identification of such institutions and
11 accounts;

12 9 An injunction against the further transfer of assets by Fax.com or Kevin
13 Katz outside the United States;

14 10 An order appointing a receiver to take charge of the affairs of Fax.com;

15 11 For payment of costs of suit herein incurred;

16 12 For payment of reasonable attorneys' fees; and

17 13. For such other and further relief as the Court may deem proper.

18
19 Dated: August 22, 2002

Respectfully submitted.

20
21 By: 

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Attorneys for Plaintiff

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable

Dated: August 22, 2002

Respectfully submitted.

By: 

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